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Nos. 84-1555, 84-1567

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

JOHN L. CONNOLLY, *et al.*,
*Appellants,*

v.

PENSION BENEFIT GUARANTY CORPORATION, *et al.*,
*Appellees.*

**On Appeal from a Three Judge Court of the United States District Court for the Central District of California**

## BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., *AMICUS CURIAE,* IN SUPPORT OF REVERSAL

*Of Counsel:*

WILLIAM S. BUSKER
DANIEL R. BARNEY
KENNETH E. SIEGEL
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
(703) 838-1857

CARL L. TAYLOR
Counsel of Record
GLENN SUMMERS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

*Counsel for the American Trucking Associations, Inc., Amicus Curiae*

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## QUESTION PRESENTED

Can Congress constitutionally attempt to preclude companies from going out of business by penalizing such changes through the imposition of withdrawal liability, where the companies have neither causal nor contractual responsibility for the problem addressed?

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## BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., *AMICUS CURIAE,* IN SUPPORT OF REVERSAL

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### INTEREST OF THE AMICUS

The American Trucking Associations, Inc. ("ATA") is the national trade association of the trucking industry, which includes more than 31,000 carriers regulated in interstate commerce. Many of these firms contribute to multiemployer pension plans and are thus subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), as amended, 29 U.S.C. §§ 1381-1405 (West Supp. 1985).

The MPPAA newly imposed on employers signatory to collective bargaining agreements, pursuant to which contributions to multiemployer pension plans were required, an absolute liability for a share of the pension plan's underfunding if the employer ceased making contributions for any reason including going out of business.[1] The Act thus made such employers the guarantors of the unfunded vested liabilities of the plans. This imposition has had a devastating impact on the trucking industry for two reasons.

The first reason is the very size of the imposition. The two largest Teamsters Union plans—the Western Conference of Teamsters Plan and the Central States, Southeast and Southwest Areas Teamsters Plan—alone in 1981 had a combined unfunded vested liability of $5 billion. United States Department of Labor, *The Funding Status of Multiemployer Pension Plans and Implications for Collective Bargaining* at 21 n.4.[2] In 1980 the stockholder's equity of the entire trucking industry—nonunion as well as union—was approximately $5 billion. *See* F.W. Liddell, *Financial Analysis of the Motor Carrier Industry* at 22, 37 (1981).

Second, the trucking industry has been particularly hard-hit by withdrawal liability because of the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793. That Act substantially deregulated the trucking industry and has caused a significant increase in both nonunion and union competition. It thus has forced a major restructuring of the unionized portion of the industry. Yet, the MPPAA, enacted only 87 days after

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[1] The term "going out of business" is used in this brief to mean any method by which a company can withdraw the value of its assets from a particular use, including dissolution, liquidation, and sale of the business.

[2] Several other Teamsters plans have unfunded vested liability in excess of $100 million each. *See, e.g., id.* Appendix D at 173, 188.

the MCA, penalizes through the imposition of withdrawal liability the actions necessary for such an industry-wide restructuring and deters unprofitable businesses from going out of business. ATA believes that the penalization of such business decisions and the attempt to force unprofitable companies to stay in business violates the Takings Clause of the fifth amendment. ATA therefore files this brief urging reversal of the court below.[3]

## SUMMARY OF THE ARGUMENT

The MPPAA imposes withdrawal liability for necessary changes in a business operation such as selling a business or going out of business. Yet withdrawal liability is a noncontractual imposition and the employer has neither contractual nor causal responsibility for the problem to which withdrawal liability is directed, pension plan underfunding. The Act thus burdens and restricts an employer in his business decisions—including the decision to cease business altogether—without a sufficient nexus to the problem. The unwarranted restriction on the employer's rights with respect to his assets violates the Takings Clause under the *Brooks-Scanlon* doctrine.

## ARGUMENT

### I. The *Brooks-Scanlon* Doctrine Prohibits Legislative Effort to Force Companies to Stay in Business Against Their Will.

The threat of withdrawal liability effectively precludes employers desiring to retrieve and transfer assets to other uses from going out of business. Such a preclusion violates the Takings Clause.

The Supreme Court sustained the constitutional right to go out of business in *Brooks-Scanlon Co. v. Railroad*

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[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of the Court.

*Commission*, 251 U.S. 396 (1920). The Brooks-Scanlon Company owned a small railroad company, primarily used as a logging road, and also owned a sawmill and lumber business. The railroad company became unprofitable because of declining volume. Brooks-Scanlon sought to discontinue the railroad business, but the state railroad commission and state supreme court ordered that it must operate.

The Supreme Court reversed, holding that to compel the railroad to stay in business against its will was an unconstitutional taking of private property by the state.[4] The Court held, first, that the carrier "cannot be compelled to carry on" its business at a loss. 251 U.S. at 399. Thus, the carrier's obligation to fulfill state regulatory commands lasts only so long as it "continues to exercise the power conferred upon it by a charter from a State." *Id.*

Second, the Court made explicit the right of property owners to withdraw from a losing business:

> If the plaintiff be taken to have granted to the public an interest in the use of the railroad it *may withdraw its grant by discontinuing the use* when that use can be kept up only at a loss.

*Id.* at 399 (emphasis added); *accord Bullock v. Florida ex rel. Railroad Commission*, 254 U.S. 513, 521 (1921) ("Without previous statute or contract to compel the

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[4] Although *Brooks-Scanlon* involved the fourteenth amendment, the courts have recognized that fourteenth amendment precedents, specifically including *Brooks-Scanlon* and others discussed below "are applicable, a fortiorari, to federal action . . . since the fifth amendment, unlike the fourteenth, contains an express prohibition against unconstitutional takings. Congressional power under either the bankruptcy clause or the commerce clause is limited by the fifth amendment." In re Penn Central Transportation Co., 494 F.2d 270, 278 (3d Cir.), *cert. denied*, 419 U.S. 883 (1974) (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589-90 (1935)).

company to keep on at a loss would be an unconstitutional taking of its property."); *Railroad Commission v. Eastern Texas Railroad Co.*, 264 U.S. 79, 85 (1924) ("To compel [a company] to go on at a loss or to give up the salvage value would be to take its property without the just compensation . . .").

The *Brooks-Scanlon* decision is a centerpiece in the law of unconstitutional takings. Federal courts have consistently recognized the constitutional right to withdraw property from an existing use. This right—denominated the "*Brooks-Scanlon* right" by contemporary courts [5]—is so basic a doctrine of constitutionally protected property that courts now describe it as a "fundament of the taking provision." *In re Central Railroad Co. of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974). The courts have consistently reaffirmed the *Brooks-Scanlon* right in the last decade.[6]

The MPPAA imposes potentially unlimited liability [7] for any permanent cessation of contributions to a pension

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[5] *See, e.g.*, In re New York, Susquehanna & Western Railroad Co., 504 F. Supp. 851, 859-60 (D.N.J. 1980); In re Penn Central Transportation Co., 458 F. Supp. 1234, 1277 & n.43 (E.D. Pa. 1978).

Although most cases applying the *Brooks-Scanlon* doctrine have involved railroads, the doctrine is not limited to railroads. *See* Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U.S. 403, 413-14 (1936).

[6] In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 611 F.2d 662, 666-67 (7th Cir. 1979); In re Penn Central Transportation Co., 494 F.2d at 280-82; In re New York, Susquehanna & Western Railroad Co., 504 F. Supp. at 859-60.

[7] Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (2d Cir.), *cert. denied*, 104 S. Ct. 3554 (1984) demonstrates that withdrawal liability can exceed the value of a company. There, the stockholder of a company liquidated the assets and distributed net proceeds of $733,082 to the stockholders. The pension fund subsequently demanded withdrawal liability, which the parties stipulated to be $817,398.

plan, including going out of business.[8] The stranglehold this places on the trucking industry can be estimated from the size of the unfunded vested benefits of plans to which trucking companies contribute. *See supra* p. 2. The price of going out of business thus can be 100% of the company's assets. To so penalize the right is to deny it, since the freedom to go out of business is meaningful only if the employer can transfer his assets to a profitable use. The result in *Brooks-Scanlon* could not have been different if, instead of commanding Brooks-Scanlon to keep the railroad in business, the railroad commission had said Brooks-Scanlon could stop the railroad but at the price of 100% of the value of the railroad.

Indeed, a central purpose of withdrawal liability was to seek to compel companies to stay in business against their will. When the Pension Benefit Guaranty Corporation ("PBGC") first proposed withdrawal liability, it justified the imposition in part as necessary to "provide a disincentive to voluntary employer withdrawals." PBGC, *Multiemployer Study Required by P.L. 95-214* at 97 (July 1, 1978) ("PBGC Study"); *accord* PBGC, *Recommendations to the Congress for Revising Multiemployer Plan Termination Insurance* at 16 (Feb. 1979) ("Requiring withdrawing employers to compensate the plan would create a financial disincentive to withdraw . . .").

The reality is that most—if not all—withdrawals are "voluntary" changes in business operations dictated by

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[8] The existence of the contingent liability provides a deterrent to sales. Although the MPPAA has exceptions that apply to sales or mergers, *see* 29 U.S.C. §§ 1384, 1398 (1982), these exceptions merely avoid triggering the liability and thus do not change potential liability. The deterrent effect on sales is not altered. *See also* PBGC Opinion Letter of November 24, 1981 (warning that selling a company through sale of stock does not "necessarily" mean that "the seller of the stock is forever clear of any liability to the plan").

economic circumstances unrelated to the contribution obligation. Because the contribution obligation is undertaken as part of a collective bargaining agreement, the employer cannot at will cease contributions during the life of the agreement, and the union can strike the employer in contract negotiations to compel him to agree to make contributions.[9] The employer can "voluntarily" cease contributions only if he goes out of business altogether or sells his company.[10]

MPPAA must be seen for what it is: an effort to lock employers into a permanent relationship with a pension plan by threatening them with confiscation of their assets if they go out of business. *Brooks-Scanlon* prohibits such an effort at statutory compulsion to stay in business.

## II. The *Brooks-Scanlon* Right Cannot Be Abrogated Where the Company Has Not Agreed To Be Responsible for the Financial Stability of a Multiemployer Plan and Had No Share in the Creation of the Problem.

Burdening the employer's right to go out of business might be treated as not within the *Brooks-Scanlon* doctrine if the employer had some contractual or causal responsibility for the problem addressed, *i.e.*, if withdrawal liability were in some sense a debt of the employer. No such relationship exists here.

An employer contributing to a multiemployer plan makes no promise, express or implied, of pension benefits

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[9] NLRB v. Amax Coal Co., 453 U.S. 322 (1981).

[10] An employer also "withdraws" if his employees decertify the union—a right of the employees under the National Labor Relations Act over which the employer has no control. With respect to trucking employers party to Teamsters collective bargaining agreements, the employer cannot cease contributions by moving locations—he merely makes contributions to a different fund (an event which under the MPPAA nonetheless triggers withdrawal liability to the first fund).

to his employees.[11] In arms-length negotiations with the union, he solely agrees to make contributions to the pension plan during the course of the collective bargaining agreement based on the number of weeks or hours worked by the employees. The plan itself has sole control over the management of the plan and makes such critical determinations as the length of service necessary for the pension to vest and the level of benefits.[12]

Moreover, the employer's reliance on the nature of his obligation to the fund is significant. In view of the employer's lack of control over the plan, he could only agree to make negotiated contributions and could not agree to underwrite the financial stability of the plan—otherwise, he would be writing the plan a blank check.

With no contractual undertaking to pay pension benefits, an employer can be held liable retrospectively for the benefits promised by the plan only if it can be shown that the employer was somehow responsible for the alleged financial instability of multiemployer plans. Where

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[11] Several district courts have recognized that withdrawal liability is noncontractual. *See* T.I.M.E.-DC, Inc. v. I.A.M. National Pension Fund, 597 F. Supp. 256, 258 (D.D.C. 1984); Debreceni v. Healthco-D.G. Stoughton Co., 579 F. Supp. 296, 297-98 (D. Mass. 1984); T.I.M.E.-DC, Inc. v. Trucking Employees of North Jersey Welfare Fund, 560 F. Supp. 294, 297 (E.D.N.Y. 1983); Peick v. PBGC, 539 F. Supp. 1025, 1062 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984). Two courts have expressly noted that withdrawal liability is a "penalty." T.I.M.E.-DC, Inc. v. I.A.M. National Pension Fund, 597 F. Supp. at 258; T.I.M.E.-DC, Inc. v. Trucking Employees of North Jersey Welfare Fund, 560 F. Supp. at 297.

[12] These features of multiemployer plans are in stark contrast to the single-employer plan held constitutional in Nachman Corp. v. PBGC, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980). There, the company had agreed through collective bargaining to pay a fixed level of benefits to its employees, based on years of service, and further agreed to fund the plan on an actuarial basis at a level sufficient to meet the obligation of fixed benefits. The employer had thus expressly promised benefits to his employees and had control over the funding.

agreement is lacking, a showing of employer responsibility for the creation of the problem addressed is the only other constitutional basis for retrospective employer liability.[13] But the employer has no such responsibility—he solely agreed to make contributions and had no control over the trustees' administration of the fund.[14]

Indeed, Congress itself must bear a large measure of the responsibility for the problem to which the MPPAA was directed—financially troubled and unstable multiemployer plans. Prior to ERISA, multiemployer plans were sound and rarely terminated.[15] ERISA increased the plans' unfunded liability through minimum vesting and non-forfeitability rules[16] and restricted the ability of multiemployer plans to respond to financial difficulties,[17] but placed no constraints on plan adoption of ben-

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[13] This is the lesson of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), where the Supreme Court held that Congress could constitutionally impose on coal mining companies retrospective liability for black lung disease contracted by employees in the course of employment. The Court emphasized that the liability was predicated on "a specific need created by the dangerous conditions under which the former employee labored." *Id.* at 19.

[14] *See* NLRB v. Teamsters Union Local 582, 670 F.2d 855 (9th Cir. 1982) (court upheld a plan's granting of a new benefit even though the employers had specifically refused that benefit in collective bargaining); Sinai Hospital v. National Benefit Fund, [1982] Daily Lab. Rep. (BNA), No. 249, at D-1 (4th Cir. Dec. 15, 1982) (the court invalidated an employer's effort to limit benefit increases by obtaining union consent to a limitation in the collective bargaining agreement). Furthermore, nothing in the MPPAA requires a fund to use withdrawal liability payments to reduce underfunding rather than raising benefits.

[15] *See PBGC Study, supra* p. 6, at 4 ("Before passage of ERISA, terminations of multiemployer plans were extremely rare.").

[16] *See* 29 U.S.C. § 1053 (1982).

[17] *House Comm. on Education and Labor, The Multiemployer Pension Plan Amendments Act of 1979*, H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 54 (1980) ("ERISA restricts the flexibility such plans had to defer funding, restrict vesting or reduce benefits").

efit increases.[18] The employer liabilities under ERISA discouraged new entrants,[19] thus providing no mechanism for replacing the contributions of employers who "withdrew" because they went out of business.

The MPPAA thus places the burden of the solution to the problem of pension plan underfunding on the shoulders of the withdrawing employer who had never agreed to be the guarantor of a pension plan's solvency. The interests of the pension plan are protected at the expense of a party without responsibility for the problems of multiemployer plans and without control over the plan's unfunded liability.

## CONCLUSION

Congress has no power to penalize and burden a company's right to go out of business as a solution for a problem not of the employer's making. ATA respectfully suggests that the decision of the three-judge panel below be reversed.

Respectfully submitted,

*Of Counsel:*

WILLIAM S. BUSKER
DANIEL R. BARNEY
KENNETH E. SIEGEL
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
(703) 838-1857

CARL L. TAYLOR
Counsel of Record
GLENN SUMMERS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

*Counsel for the American Trucking Associations, Inc., Amicus Curiae*

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[18] *See* 126 Cong. Rec. H4163 (daily ed. May 22, 1980) (remarks of Rep. Erlenborn).

[19] The PBGC feared that the ERISA rules would discourage new entry. *PBGC Study, supra* p. 6, Appendix I at 7.